

11-5019-cr
USA v. Casimiro

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of December, two thousand thirteen.

PRESENT:

DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
RAYMOND J. LOHIER, Jr.,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

-v.-

No. 11-5019-cv

JOSE M. NUNEZ, PEDRO T. ROLFFOT, MANNY A. JIMENEZ,

Defendants,

RAFAEL CASIMIRO,

Defendant-Appellant.

JESSE M. SIEGEL, New York, *for Defendant-Appellant.*

EDWARD Y. KIM, MICHAEL A. LEVY, Assistant United States Attorneys, *for Preet Bharara, United States Attorney for the Southern District of New York, New York, NY, for Appellee.*

1 The district court need only find disputed facts relevant to sentencing determinations by a
2 preponderance of the evidence. *See United States v. Garcia*, 413 F.3d 201, 220 n.15 (2d Cir. 2005).
3 We review a district court's finding of facts made after a *Fatico* hearing for clear error. *See United*
4 *States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir. 2005). Clear error will be found only where 'the
5 reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has
6 been committed.' *United States v. Cuevas*, 496 F.3d 256, 267 (2d Cir. 2007) (internal quotation
7 marks omitted). "Where there are two permissible views of the evidence, the factfinder's choice
8 between them cannot be clearly erroneous." *United States v. Chalarca*, 95 F.3d 239, 244 (2d Cir.
9 1996) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)). In particular, we
10 "give a district court's findings as to the credibility of witnesses strong deference." *United States*
11 *v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002) (internal quotation marks omitted).

12 There was sufficient evidence in the record that we cannot say it was error, much less clear
13 error, for the district court to credit Gonzalez's testimony over Casimiro's testimony. As the district
14 court observed, Casimiro's testimony was "internally inconsistent" while Gonzalez's testimony was
15 "much more coherent." For example, Casimiro claimed that prior to April 28, 2009, he had been
16 involved in only four drug deals, the last of which occurred nearly a year prior to the April 28, 2009
17 transaction. Yet, despite testifying that he had completed only four deals the last of which was
18 nearly a year earlier, Casimiro admitted that he had \$36,000 in cash at his home on April 28, 2009.
19 Casimiro implausibly explained that he kept this money at home because he liked to have it with him
20 to use at clubs and on vacation, even though he admitted that he would only need "two, three
21 hundred bucks" at any given time for the purposes he mentioned. Casimiro then seemed to change
22 his story and explained that he held onto the cash in case Gonzalez offered him an opportunity to

1 participate in a new drug deal. The district court acted well within its discretion in concluding that
2 the more plausible explanation for why Casimiro had so much cash on hand was, as Gonzales
3 described, Casimiro was a more active drug dealer than he admitted. In contrast to Casimiro's
4 testimony, Gonzalez's testimony—as the district court found—was “much more coherent.” This alone
5 is sufficient for us to conclude that the district court's finding was not clearly erroneous.

6 In any event, where there are two possible views of the evidence and the result turns on the
7 credibility of witnesses, we afford the district court strong deference. The district court's decision
8 to credit Gonzalez's testimony and reject Casimiro's testimony was supported by the record and we
9 cannot say it was clearly erroneous. With this factual finding affirmed, there is no dispute that the
10 district court correctly denied Casimiro safety-valve relief, denied him credit for acceptance of
11 responsibility, and held him accountable for more than five kilograms of cocaine in calculating his
12 Guidelines offense level.

13 We have reviewed Casimiro's remaining arguments and find them to be without merit. For
14 the foregoing reasons, the judgment of the District Court is **AFFIRMED**.

15 FOR THE COURT:
16 Catherine O'Hagan Wolfe, Clerk

The block contains a handwritten signature of Catherine O'Hagan Wolfe in black ink. The signature is written over a circular official seal of the United States Court of Appeals, Second Circuit. The seal features the text "UNITED STATES", "SECOND CIRCUIT", and "COURT OF APPEALS" around a central emblem.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

This block contains a second instance of the handwritten signature of Catherine O'Hagan Wolfe over the official seal of the United States Court of Appeals, Second Circuit, identical to the one in the previous block.